NO. 11612

In the United States Circuit Court of Appeals for the Ninth Circuit

ALMOND G. FULLER, APPELLANT,

v.

THE UNITED STATES OF AMERICA, APPELLEE.

On Appeal from the District Court
for the Territory of Alaska,
Third Division

BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE

On the 3rd day of October, 1946 the grand jury filed in the District Court for the Territory of Alaska, Third Judicial Division, an indictment charging the appellant with murder in the second degree in violation of Section 4759, C. L. A., 1933. On the 11th day of October, 1946 the appellant, through his counsel, George B. Grigsby, Esquire, withdrew a plea of not guilty previously entered on the 9th day of October, 1946, and entered a plea of guilty to the crime of murder in the second degree as set forth in the indictment. (R. 324). Subsequently, on the 19th day of October, 1946, the appellant appeared in court with his attorney, George B. Grigsby, and withdrew the plea of guilty and entered a plea of not guilty to the charge of second degree murder as set forth in the indictment. After a trial by jury appellant was convicted of second degree murder and was sentenced to imprisonment for a period

of twenty-four years, on which judgment this appeal followed.

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (p. 1).

STATEMENT OF FACTS

On the 17th day of July, 1946, the appellant, in company with one Jean Mackey, with whom he had been living, arrived in Anchorage on the train from Whittier. From the depot they went to the residence of a friend of Fuller's by the name of Glen McCall, stopping on the way, however, to purchase liquor. There had been drinking on the train enroute to Anchorage but the appellant was not drunk upon arrival (R. 233). However according to appellant, considerable liquor was consumed after arriving at McCall's. Approximately 10:00 o'clock in the evening of the day in question Fuller paid a visit to one Alfonso Freeland, a Negro who lived nearby at 1108 E Street. He did not remember the exact time but places it at around 10:00 o'clock (R. 249). He went alone at first and he and Freeland had some conversation, and appellant departed and later returned with Jean Mackey (R. 250), taking with him two bottles of liquor (R. 252). Freeland was alone in his home at this time (R. 233-237) and later on another colored man by the name of Thomas Jones came in to visit Freeland. According to the testimony of Alfonso Freeland he had intercourse with Jean Mackey after Fuller stated to him that it would be all right. While this act was taking place Fuller retired to the kitchen (R. 69). Upon Jones' arrival, which was about 11:00 or 11:30 in the evening, Fuller, the appellant, and Jean Mackey were in the double bed together. Freeland was in a single bed in the same room (R. 90). Fuller told Jones to come and get in bed with them (R. 91). Appellant

had intercourse with Jean Mackey, after which he asked Jones if he cared for some. After Jones had completed the act of intercourse with Jean Mackey, Fuller requested her to have unnatural relations with him, and upon her refusal, he slapped her. She started bleeding and arose from the bed, going into the kitchen, with Fuller following her. There was a scuffle in the kitchen (R. 91). Jones later went outside and saw Fuller standing in the yard, naked, with blood on his chest.

Upon looking for Jean Mackey, Jones found her lying in the body of a truck with her face bruised. He brought out a wet towel and the appellant wiped the woman's face. Jones returned to bed, and Fuller came in and got clothes and went back outside. Following the scuffle in the kitchen the appellant Fuller proceeded to brutally assault the deceased, Jean Mackey, by beating her and kicking her while she was on the ground (R. 138). This took place at approximately 1:00 a. m.

Ted Bruckbauer had seen Fuller earlier in the evening at Freeman's house through the pantry window at about 9:30 or 10:00 o'clock, at which time appellant appeared to be in a good mood (R. 162). Bruckbauer further testified as to the beating, stating that Fuller had beaten his victim severely about the head and kicked her at a time when she was on the ground and apparently unconscious. After the severe beating and kicking administered to the unresisting body of the victim, the appellant went into the house and shortly returned, after which he again resumed his assault upon the prostrate body of the woman (R. 139 and R. 162). He then grabbed her by the hair of the head and dragged her to the alley and placed her in the body of an old panel truck, where she was discovered the following day with her body entirely concealed by a covering of old rags, etc., with only the fingers exposed.

Following this assault, according to the appellant's testimony, he next found himself at a place known as the "Snake House" the following day. While there he learned that the police were seeking him, and he fled (R. 253). He was apprehended some two weeks later at a railroad section station known as Rainbow, approximately twenty miles from Anchorage. The apprehension was effected by Agents Daniel Bryan and Frederick Frohbose, special agents of the Federal Bureau of Investigation. The appellant had been seen coming down the track approaching Rainbow, and the two agents mentioned concealed themselves by the side of the track and waited for the appellant's arrival near them. When he arrived at a position approximately ten feet from Frohbose, the latter rushed down an incline identifying himself as an F. B. I. agent and ordering Fuller to put his hands up. Then appellant, instead of immediately obeying the order, made some motion as if to strike Frohbose or reach for a gun, whereupon Frohbose struck him twice, once with his gun and once with his fist. The appellant fell to the tracks but immediately got up and raised his hands, and the two agents made a quick search for weapons. They took him down the track to Rainbow and there awaited the arrival of a scooter car from Anchorage, in which they all returned to Anchorage, arriving at approximately 8:30 or 8:45 and immediately went to the office of the Federal Bureau of Investigation. Upon his arrival at the F. B. I. office Fuller was permitted to remove his wet clothing, was given food, cigarettes and received the attention of a doctor. He was also photographed and turned over to the marshal of the federal jail at approximately 1:10 a. m. on the following morning, August 3rd. During the period of time between 8:30 or 8:45 p. m. and 1:10 a. m. the appellant was questioned concerning his participation in the crime, and signed a written statement which was later admitted into evidence (R. 175-180).

ARGUMENT

I

There Was No Error On the Part of the Trial Court in Admitting into Evidence for Consideration By the Jury the Confession Made By Appellant to Agents of the Federal Bureau of Investigation

The mere fact that a confession is made at a time when an accused is in custody will not render a confession otherwise voluntary inadmissible. The admissibility of such a confession is first determined by a preliminary examination of the Court. *State* v. *Blodgett*, Supreme Court of Oregon, 92 Pac. 820. As set forth in the above case, the inquiry is preliminary to the admission of the evidence and is addressed entirely to the judge. At page 822 of the same opinion we find the following language employed by Judge Slater:

> A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in some sense elicited by threats or promises, and a prisoner's confession will not be rejected as evidence merely because it was made in answer to a question which affirmed his guilt.
>
> Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession if it appears to have been voluntary and was not obtained by putting the prisoner in fear or by promises. *Sparf* v. *United States,* 156 U. S. 51. *Wilson* v. *United States,* 162 U. S. 613. * * *.
>
> The warning given by the district attorney to the prisoner before he addressed any questions to him to the effect that whatever he said would be used against him and that he need not make any statements unless he desired to, overthrows any possible inference of duress that might otherwise be drawn from the form and manner of the questions afterwards put to the prisoner and this fact distinguishes this case from such cases as *Bram* v. *United States,* 168 U. S. 532 (other cases cited), cited by counsel for defendant in support of his contention.

It will be noted in the case before us that appellant was not abused, no threats were made, and he freely related everything contained in the statement, after having been advised that he did not have to make such a statement and that if he did so, it could be used against him. This admonition is also contained in the written statement itself, which the appellant signed after having read it aloud (R. 180). Appellant admits, himself, that no threats were made to him in the F. B. I. office nor was he abused in any way at that time (R. 195). In *Young et al.* v. *Territory of Hawaii,* C. C. A. 9th Circuit, 1947, 163 Fed. 2d 490 at page 494, quoting Justice Garrecht:

> As we shall see hereafter, the voluntary nature of Miss Nozawa's statement was a matter to be determined preliminarily by the trial judge and ultimately by the trial jury.

And at page 495 Judge Garrecht quotes from the case of *Lyons* v. *Oklahoma,* 322 U. S. 596, as follows:

> The voluntary or involuntary character of a confession is determined by conclusion as to whether the accused at the time he confesses is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime. (Cases cited). * * * But when there is a dispute as to whether the acts which are charged to be coercive actually occur or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the testimony of the witnesses, but the legal duty is upon them to make the decision. (Cases cited).

In *Osborn* v. *People,* Supreme Court of Colorado, 262 Pac. 892, quoting from Judge Butler's opinion, at page 893:

> Whether or not a confession was voluntary is primarily a question for the trial court.

And in *Ah Fook Chang* v. *United States*, 9th Circuit, 91 Fed. 2d 805, Judge Haney in his opinion, at page 809, stated:

> The mother and son both testified that statement was made under threats and compulsion. On the other hand, an inspector of the police, a captain of police, and a Federal narcotic agent all testified to the contrary. Since the credibility of the witnesses is an important element in weighing the evidence, we believe the trial court's judgment thereon must be sustained. We therefore hold there was no error in denying the motion to suppress a statement made by the mother and admitting the same in evidence on the trial.

The record of the case before us reveals that the Court went to considerable length in an effort to determine whether or not the confession of appellant was legally admissible. After having determined that it was admissible, it was submitted for the consideration of the jury under proper instructions. The Court itself even went so far as to engage in questioning witnesses relative to the admissibility of the statement (R. 204). The mere fact that the appellant was in custody, in the absence of threats or promises to induce a confession, will not render it inadmissible. This principle is further supported in *Sykes* v. *United States,* 143 Fed. 2d. 140:

> It was insisted at the argument that the admission into evidence of the statements made by the appellant to the police officer prior to arraignment was contrary to the rule announced by the Supreme Court in the McNabb case. We think there is no merit in the contention.
>
> In the subsequent cases of *United States* v. *Mitchell* the Supreme Court explained that the rule in the McNabb case did not render inadmissible a voluntary confession obtained during an illegal detention, provided that it was not induced by the illegal detention.

And in the case of *United States* v. *Ruhl,* 55 Fed. Supp. 641:

> A confession voluntarily made is not rendered inadmissible by subsequent illegal detention of accused without taking him before a committing magistrate.
>
> Failure to take accused before a committing magistrate immediately upon his arrest does not render a confession inadmissible. In determining whether a confession is admissible as a matter of law, Court must determine whether reasonable minds might differ in connection with the circumstances under which confession was obtained as to whether it is voluntary or involuntary.
>
> Where a confession appears to be admissible but a question of fact as to whether it was voluntarily or involuntarily made is involved, it must be submitted to the jury with instructions to determine its voluntary or involuntary character as a question of fact, and Court must exclude it from consideration or consider it along with the other evidence depending upon whether the Jury finds it to be voluntary or involuntary. A confession obtained after repeated questioning, over a long period of time and without threats or punishment or any promise of reward was submitted to a Jury along with such evidence of circumstances surrounding the making of confession as government and accused might wish to present, leaving it to the Jury to determine whether confession was voluntarily made and therefore entitled to consideration, though accused was not taken before committing magistrate until almost two months after his arrest.

In *Wheeler* v. *United States* and *Patton* v. *United States,* District of Columbia, 165 Fed. 2d 225, Associate Justice Wilbur K. Miller, in his opinion at page 230, stated:

> It is true that in holding Patton from 3:00 o'clock Sunday morning until Tuesday without

> taking him to the nearest available commissioner, the officers violated Federal Criminal Rule 5(a). Patton relies upon the following cases as showing that on that account he is entitled to reversal: *McNabb* v. *United States,* 318 U. S. 332; *United States* v. *Mitchell,* 322 U. S. 65; *White* v. *Texas,* 310 U. S. 530; *Chambers* v. *Florida,* 309 U. S. 227; *Ziang San Wan* v. *United States,* 266 U. S. 1; and *Akowskey* v. *United States,* 158 Fed. 2d 649. Those authorities do not help him as the facts of this case render them inapplicable. While the officers acted unlawfully in failing to present Patton to a commissioner more quickly than they did, it does not appear that the delay induced the confession which he made Monday night.

While no serious contention is made that the appellant in this case was illegally detained, some point is made of the fact that he was not immediately taken before the nearest magistrate. The apprehension of appellant was effected on August 3, 1946, which was on a Saturday, and the arrival of the arresting party in Anchorage was at a time after the United States Commissioner's court had suspended for the weekend. While it does not appear in the record, it is logical to assume that appellant was taken before the Commissioner without unnecessary delay on the following Monday. Had this not been true, appellant would certainly have brought this fact out in the trial of the case in connection with the admissibility of the confession. And as matter of fact, the appellant at no time prior to making the confession, asked to be taken before the Commissioner. The latest word of the Supreme Court in connection with the admissibility of confessions is to be found in *United States* v. *Mitchell,* 322 U. S. 65, in which case the McNabb case is distinguished as related by the opinion of Justice Franklin at page 67.

> In the circumstances of the NcNabb case we found such an appropriate situation in that the

> defendants were illegally detained under aggravated circumstances. One of them was subjected to unremitting questioning by a half dozen police officers for five or six hours, and the other two for two days.

Page 69:

> As pointed out in the McNabb case, "The mere fact that a confession was made while in custody of the police does not render it inadmissible.

Page 70:

> Here there was no disclosure induced by illegal detention. No evidence was obtained in violation of any legal rights. But instead, the consent to a search of his home, the prompt acknowledgment by the accused of his guilt, and the subsequent ruling apparently of such spontaneous cooperation and confession of guilt.

In a separate opinion by Justice Reed (p. 71), we find the following language:

> If confession is freely made without inducement or menace, it is admissible. If otherwise, it is not. For if brought about by false promises or real threats, it has no weight as proper proof of guilt.

It is submitted that the confession in the case before us meets the test laid down by the Supreme Court in the above cited case. As a matter of fact, in practically all of the cases above cited, we find the circumstances claimed to be prejudicial to the defendants much more aggravated than in the present case, if it can be said that any aggravation whatever existed. There is no evidence whatever that any threats or promises were made to appellant at the time the questioned statement was made. However, it is his contention that it was prompted by the fact that he was struck by the arresting officer at the time of his appre-

hension. This particular point has been raised in the case of *Roman* v. *State,* Supreme Court of Arizona, 201 Pac. 551; *Osborn* v. *People, supra; Territory* v. *Emilio,* Supreme Court of New Mexico, 89 Pac. Rep. 239. In the latter case appellant complained of the admission of an alleged confession by him as to the homicide. At the time of the arrest the appellant was ordered to surrender and he replied that he would not, and the sheriff then ordered the posse to fire at appellant, which was done; that he thought he heard appellant groan and then ordered the posse to cease firing; that appellant then said not to shoot and that he would surrender. The witness then ordered appellant to get up and throw up his hands, which he did, and then when about six yards from witness appellant dropped one of his hands and witness told him to again raise it or he would shoot appellant. Following this encounter several statements were made by defendant which were testified to in court over objections of defendant. Judge Parks in his opinion stated, at page 241:

> * * * The fundamental principle upon which confessions have been excluded which are induced by promises or threats, hope or fear, is that under such circumstances the tendency to speak falsely is so great as to render the statement entirely untrustworthy. Wigmore on Evidence, Section 822. Another principle of exclusion is established by the highest court in the land, viz. that that portion of the 5th Amendment to the Constitution of the United States which provides that no person "shall be compelled in any criminal case to be a witness against himself" excludes involuntary confession. *Bram* v. *United States*, 168 U. S. 532. These two principles or rules of exclusion are widely different in character and effect. Thus, under the former, the object is to exclude statements which are false. Under the latter, the object may be to exclude statements which are true. Wigmore on Evidence, Section 823. But under either of these

rules are the statements objectionable? In the first place, it is to be observed that no solicitation of any kind or character was made on defendant to make a statement, and no promises offered. Then, as soon as he surrendered, and before he had been informed of the cause of his arrest, of his own motion he began to talk and stated he had killed a woman. At the body of the deceased, he was interrogated by one of the posse whether the deceased was the one he had killed, and he said she was. This was but a continuation of a statement begun by defendant without solicitation at the point of arrest, and is not objectionable within the doctrine of the Bram case, because of the interrogation. The defendant was not, therefore, moved to make the statement by any promise which excited hope in his mind of advantage or immunity. Again, no threats of injury of any kind were made. Every act of the officers in making the arrest was entirely legal and proper. They were not intended or designed to extort a statement from the defendant by exciting his fears. If violence attended his arrest, the defendant was alone responsible for the same by his resistance. It does appear that a considerable number of people had gathered near the body of the deceased, but not a single word was uttered by any member of the congregation, and no act was committed, from which a menace or threat could be implied. If fear induced the defendant to speak, it was the fear of the consequence of his crime to be suffered in a legal way, and was not a fear of present danger excited by threats or direct act or acts from which a menace could be reasonably implied. It is true defendant testified he was afraid, and for that reason made the statements, but all the circumstances tended to refute this claim, and the Court so determined, and properly, as we think. Under such circumstances every inducement was offered to deny the crime, and none appeared to admit it. In such case a confession is voluntary. (Cases cited)

In *Roman* v. *State, supra,* in which case confession of having committed first degree murder was made by defendants after they had been arrested and had been shot after attempting to shoot officers in resisting arrest but before they had been accused of any crime, in response to question—"What have you boys done that makes you so wild?"—held not to have been obtained by threat, coercion or promise. It was stated by the Court:

> There was certainly no threat or promise in this question. The desperate resistance to arrest no doubt aroused in the mind of the questioner a suspicion and prompted the question, and whatever may have been the reason that actuated the defendant and Martinez in confessing their connection with the Tempe murders it is not apparent that they did so under any threat, or fear, or hope, or promise.

In the *Osborn* case, *supra,* at page 893:

> To make a confession involuntary because of promises or threats, the promises or threats must have induced the confession, and there must be a connection between the promises or threats and confession which must have been caused, prompted, or induced by promises or threats. If promises or threats do not have the influence to induce the confession, the confession must be referred to other motives.

The circumstances of the present case come well within the rule just set forth. No connection whatever is shown between the blows administered to appellant at the time of his apprehension and the confession made by him several hours later. The circumstance of the apprehension cannot be placed in the category of a brutal beating intimated by appellant. It will be remembered that the arresting officers were dealing with a fugitive who had been at large for approxi-

mately two weeks, and it was believed by Agent Frohbose that appellant at the time of arrest was armed. It is true that Mr. Frohbose could have remained in hiding and ordered the appellant to surrender before he approached him. However, in that event, if the appellant had made any motion indicating resistance, in all probability it would have been necessary for the officer to shoot him. Undoubtedly, the agents of the Federal Bureau of Investigation are instructed and trained to make arrests without recourse to such drastic measures. In attempting to make this arrest, rather than rely upon the possibility of having to fire upon appellant, the officer chose to dash down the incline and arrive within striking distance of appellant, depending upon the element of surprise and his ability to physically overcome him in the event of resistance, rather than to resort to the more severe measure. He probably was somewhat excited under the circumstances, and it might possibly be that he misinterpreted appellant's actions in not immediately and properly responding to the demand to raise his hands. And the blows struck by Mr. Frohbose were only those necessary to effect the arrest of one he considered a desperate fugitive. There is no evidence whatever that can be interpreted in any manner as displaying brutality or mistreatment of appellant. To the contrary, upon his arrival at the section house at Rainbow, appellant was offered a sandwich by one of the section hands, which he refused. He was also given a drink of water (R. 289), although the appellant denies these facts. As previously stated, upon his arrival in Anchorage he was afforded an opportunity to remove his wet clothing and was furnished with food and cigarettes, and the services of a doctor were obtained for his comfort and welfare.

Nowhere do we find here a case in which appellant was subjected to what is ordinarily referred to as the

"third degree." Those present during the interview were Agent Bryan, Chief of Police Johannsen and Mr. Frohbose. Mr. Frohbose and Mr. Johannsen both engaged in questioning the appellant (R. 190). However, no contention is made that the questioning was of such nature as to amount to coercion. It appears from appellant's opening brief that the principle point upon which he bases his contention that the confession was not free and voluntary is the fact that appellant's mental and physical condition were such at the time of making the statement that it could not be considered a free and voluntary statement.

The following case deals somewhat with this subject: *Taylor* v. *State,* Criminal Court of Appeals, Okla., 225 Pac. 988, at page 992:

> The rule generally adopted in regard to admissions or confessions made by persons said to be mentally deranged is that the admissibility or voluntary character of the confession is not affected thereby, but the circumstances are to be taken in consideration by the jury in weighing the evidence. A confession under such circumstances should not be rejected merely because it was made under great excitement or mental distress, or fear, where such state of mind was not produced by extraneous pressure exerted for the purpose of forcing a confession, but springs from apprehension due to the situation in which the accused finds herself.

In *Mergmer* v. *United States,* D. C., 147 Fed. 2d 572, Justice Miller at page 572 makes the following statement:

> The drunken condition of an accused when makin a confession, unless as such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession but may affect its weight and credibility to the jury.

Skiskowski v. *United States*, 158 Fed. 2d 177, Associate Justice Clark states, under Syllibus 1 at page 180:

> It is not argued that appellant, Skiskowski, was subjected to any physical abuses or torment during periods of interrogation. It was not shown that he was, in fact, physically ill, and the record discloses no evidence from which it can reasonably be inferred that he was mentally exhausted from extended and harrassing questioning period.

And in *Bell* v. *United States,* D. C., 47 Fed. 2d 438, Chief Justice Martin, in his opinion, at page 439, makes the following statement:

> The rule of law seems to be well settled that the drunken condition of accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession but may affect its weight and credibility with the jury (cases cited). This rule has been applied in many cases. The fact that defendant was more or less intoxicated when he confessed does not exclude the confession if he had sufficient mental capacity to know what he was saying.

Appellant contends that he did not remember reading the statement and that his mind was kind of a blank at times and he did not know exactly what he was signing (R. 193-197). When taken into consideration with his admission of his initials on various corrections in the statement, coupled with the fact that he remembers various other small details at or about the time of making such statement (R. 199) were matters which under the foregoing decisions were for the jury and did not render the statement inadmissible.

In *State* v. *Henderson,* 184 Pac. 2d 392, there was a similar set of circumstances (p. 403) in which it was testified to by the F. B. I. agent that the defendant read the statements and called attention to several mistakes

that had been made and that some were crossed out and other words added, and they were initialed. Defendant contended that he looked it over but did not read it over. In the foregoing case a judgment of conviction of murder in the first degree was affirmed.

There is no presumption against a confession. *Gray* v. *United States,* C. C. A., 9th Circuit, 9 Fed. 2d 337, page 339, Judge Gilbert in his opinion states:

> It is the rule in the federal courts that the fact that a confession is made by an accused person, even while under arrest, or when drawn out by the questions of an officer, does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. *Murphy* v. *United States,* 285 Fed. 801, 807; *Sparf* v. *United States,* 156 U. S. 51; and *Perovich* v. *United States,* 205 U. S. 86, 91.

This same point is made in *Hartzell* v. *United States,* 72 Fed. 2d 569, in which case certiorari was denied, 298 U. S. 621. At page 577 of that decision Judge Gardner in treating upon this question, says:

> In the federal courts there is no presumption against voluntary character of a confession, and the burden is not on the government in first instance to show its voluntary character. Citing *Gray* v. *United States* 9, Fed. 2d 337; Wigmore on Evidence 2d Edition, Section 860.

However, under this ruling the government in the present case went further than was necessary and did establish the fact that the confession was free and voluntary under the test provided by all of the foregoing decisions. There may have been some minor conflicting testimony as to the voluntary character, but under such circumstances it has been held repeatedly that conflicting evidence should go to the jury. *Lyons* v. *Oklahoma, supra*; *United States* v. *Ruhl, supra*;

Wheeler v. *United States, supra*; *Osborn* v. *People, supra*; *Young et al* v. *Territory of Hawaii, supra*; *Ah Fook Chang* v. *United States, supra; Mergmer* v. *United States, supra.*

Justice Roberts in the case of *Lisenba* v. *California*, 314 U. S. 219, gives a lucid and concise statement as to this question regarding confessions, at page 238:

> There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not eo nomine one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of orderly liberty, as to amount to a taking of life without due process of law.

And the Court goes on (p. 241) as follows, in speaking of the defendant:

> He exhibited a self-possession, a coolness and an acumen throughout his questioning and at his trial, which negatives the view that he had so lost his

> freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny or to refuse to answer.

In the present case, there is a fair comparison between that statement and the demeanor of the appellant when testifying on the stand, who, in one or two instances, stated positively, "I am not answering any further questions." (R. 271). And we find him alternating this kind of answer with the answer that he did not remember. It was not necessary in the instant case to cajole, threaten, intimidate or otherwise induce the appellant to make a statement, but on the contrary it appears that the one spark of decency remaining in his character prompted the desire to rid his conscience of the horror of his burden. He told the agent in charge of the Federal Bureau of Investigation, Mr. Teague, upon his arrival at Anchorage following his arrest, that he wanted to get it off his mind. (R. 296). And later, when asked by Mr. Frohbose in the F. B. I. office if he wanted to make a statement, he answered that he did (R. 213). The language used in *State* v. *Henderson, supra,* by the Court at page 404, quite probably coincides with the facts as they existed here.

> * * * * The load of the criminal deeds which a wrongdoer has committed is a heavy one and not infrequently he wants to talk to someone. * * * The trial judge, in ruling upon the admissibility of his purported confessions, had a right to believe that the weight of his load, not compulsion, caused him to speak.

A number of the cases cited by appellant in his opening brief can be distinguished from the present case. In *People* v. *Loper,* 112 P. 720, cited by appellant, the defendant was cajoled, brow-beaten and persuaded; was called a monumental liar; was told that deceased's

friends would have hanged him to the first tree if sheriff had taken him to the place where the body was found. Then was solitarily confined and confessed the following morning.

In the case of *United States* v. *Lolardo*, 2d Circuit, E. D., N. Y., 67 Fed. 2d 883, Judge L. Hand, at page 885, states as follows:

> The authorities are so many and so varied that we are of necessity confined to those in the Federal courts which alone are authoritative for us. The leading case is *Bram* v. *United States,* 168 U. S. 532. * * * In spite of the court's treatment of those decisions as a safe-guard * * * we do not believe that it meant to commit itself to the doctrine that the mere hope of a lighter punishment shall exclude a confession.

Then the Court cites and distinguishes the following cases which have been cited by appellant:

Perrygo v. *United States,* 2 Fed. 2d 181, in which a boy of 17 and of low mentality was examined by four or five policemen for approximately an hour and a half. *Purpura* v. *United States,* 262 Fed. 473, where the accused was held incommunicado for 24 hours. *Davis* v. *United States,* 32 Fed. 2d 86, in which case the accused was brought to a morgue where his putative victim lay and was there examined. It can readily be seen that the facts of these cases are distinguished from those in the present case.

An examination of the other cases cited by appellant will also indicate that the facts there are different from the present facts. It is submitted that the facts revealed in the record in the light of the decisions above set forth make it obvious that the Court did not err in admitting the confession of appellant and submitting it to he jury under proper instructions.

II

The Trial Court Did Not Err in Admitting into Evidence Plaintiff's Photographic Exhibits I and II

The photographs complained of as set forth in appellant's opening brief, page 16, were submitted for the purpose of corroborating oral testimony previously given by witnesses as to the severity of the beating administered to the deceased, Jean Mackey, by the appellant. The admissibility of photographs in assisting the jury in their consideration upon any material fact in the case is always admissible. This is true regardless of whether or not such exhibits are of a gruesome nature. This principle of law has been discussed and decided in a number of jurisdictions. *State* v. *Nelson,* 92 Pac. 2d 182, Supreme Court of Oregon, p. 191.

> Although a photograph might be prejudicial because of its so-called gruesome character, it is nevertheless admissible in evidence if material to some issue in the case. *State* v. *Weston,* 62 Pac. 2d 536; *State* v. *Weitzel,* 69 Pa. 2d 958; 2 Wigmore on Evidence, Section 1157; *Commonwealth* v. *Retkovitz,* 110 N. E. 293; *State* v. *Gaines,* 258 Pac. 508.
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> The arguments which defendant presents to the effect that State's Exhibit O was improperly admitted because it was a gruesome photograph, find answer in *State* v. *Weston, supra.* In that case the court, speaking by Mr. Justice Rossman, gave a very complete analysis to the law applicable to so-called "Gruesome" exhibits. The opinion and authorities there set forth, it is believed, constitute a clear showing that the court committed no error in the present case in admitting in evidence State's Exhibit O. * * * The rule of law is that exhibits of this character, sometimes known as real evidence, are admissible if they are material as evidence. * * *
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> State's Exhibit O was material in the present case to prove the exact nature and manner in which death was caused to the deceased by the bullet

> wound inflicted by defendant. It was material for the purpose in exactly the same way that the testimony of the physicians who performed the autopsy was admissible. * * * There is no doubt that the photograph is clearer and more understandable evidence than oral testimony. That it was cumulative does not affect its materiality.

In *State* v. *Weston et al.,* 64 Pac. 2d 536, Supreme Court of Ore., cited in the foregoing opinion we find a further expression of this matter at page 543:

> From the above authorities we deduce the rule that maps, photographs, et cetera containing markings are not inadmissible if they are otherwise revelant and if the individual who made the mark or wrote the legend was familiar with the facts and so testifies. * * *
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> Defendant's third contention submits that the cast was a gruesome object, prejudicial to him, and that it was therefore inadmissible. The rule that pertains to the problem of prejudice arising from the exhibition to the jury of wounds, et cetera, is thus stated in Section 1157 Wigmore on Evidence, 2d Edition: "The autoptic preference to the jury of the weapons or tools of the crime, or of the clothing or the mutilated members of the victim of the crime, has often been objected to on ground of Undue Prejudice. * * *

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> * * * but it is to be doubted whether the necessity of thus demonstrating the method and results of the crime should give way to this possibility of undue prejudice. * * * But, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the courts.
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> In murder cases objects much more prejudicial to the defendant than a plaster cast have frequently been held admissible in evidence. In

Savary v. *State,* 87 N. W. 34, 35, the Court held that the skull of the deceased and a photograph thereof was properly admitted. * * * In *State* v. *Mariano,* 91 Atlantic 21, 26, the decision stated. "In this case the manner of the killing was a matter of inference. The fractured bones served to demonstrate the destructive force and effect of the blows inflicted better than a technical verbal description and gave the jury opportunity as practical men to judge for themselves whether the injuries were likely to follow from a stone or similar weapon as described by the medical witnesses." * * *

In murder cases photographs showing the wounds upon the body of the deceased have frequently been held admissible, even though the pictures were repulsive and would therefore adversely affect the interests of the defendant. In *State* v. *Casey,* 213 Pac. 771, 217 Pac. 672, enlarged photographs of the deceased's wounds were held admissible. In *State* v. *Gaines,* 258 Pac. 508, the Court sustained the admissibility of a portion of the skull of the deceased and the photograph of the head of the deceased showing injury. In *Commonwealth* v. *Retkovitz,* 110 N. E. 293, 294, the court declared: "The photographs of neck and face of the dead woman, Domka Peremebida, for the murder of whom the defendant was on trial, rightly were admitted in evidence. * * * Natural abhorrence of a crime such as that charged in the indictment was an inevitable incident of the trial. Competent and material evidence is not to be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." In *State* v. *Miller,* 161 Atlantic 222, 224, the court sustained the admissibility of photographs which showed not only the bullet wounds on the body of the deceased but also his entire body. We quote from the decision: "It was argued that the photographs would cause a feeling of repulsion and would prejudice the minds of the jury against the defendant. It is not contended that the photographs were not gen-

> erally correct. They were competent to prove the nature of the wounds, the identity and the cause of death of the deceased." In *State* v. *Burrell,* 170 Atlantic 843, 846, the Court held that no error was committed in the reception of two photographs of the body of the decedent which were offered to show marks and bruises on her throat, in support of the State's theory that the woman had been choked to death by a man's hand. We quote from the decision: "The argument against the admission of the photographs is that they served 'to prejudice the mind of the jury against the defendant.' That contention, if true in point of fact, is ill founded in point of law. * * * Assuming that they tended to prejudice the mind of the jury, that does not render their admission illegal. They tended to prove a material fact, without which the State would be unable to support the charge laid in the indictment." Also citing *Commonwealth* v. *Winter,* 137 Atlantic 261, 263; 2 Wigmore on Evidence, Section 792; *Commonwealth* v. *Sydlosky,* 158 Atlantic 152.

In *State* v. *Eggleston,* 297 Pac. 162, Supreme Court of Washington, the court held:

> Appellant next claims that the Court erred in admitting in evidence State's Exhibit A, being a photograph showing the effect of the gunshot wound on the body of Walter Engstrom. With this we cannot agree.

State v. *Cunningham,* 144 Pac. 2d 303, Supreme Court of Oregon, page 311:

> The defendant does not claim that the photograph of the coat is inaccurate or fails to faithfully portray the coat's condition. It will be recalled that Dr. Beeman made the infrared photograph of the coat because photographs of that kind show spots on dark material which would otherwise be difficult of detection. Both the photograph and the coat are before us as exhibits.

> It is a matter of almost daily observation that photographs, timely made, can help materially in getting at the facts of a case, and it would be nothing less than folly for the courts in their quest for the truth to disregard the help which any science offers. We have mentioned the defendant's single objection to the introduction of the photograph: "The jury can see that coat as well as a photograph, and understand it just as well." We are satisfied that the objection is based upon a misconception of what the infrared photograph reveals". It was properly overruled.

A case involving an extreme set of facts is that of *State* v. *Smith,* 83 Pac. 2d 749, Supreme Court of Washington. In the above case, as in the present, death was a result of a beating administered by the defendant. The body of the deceased was exhumed four months after burial and a second autopsy held, at which time several photographs of the body were taken. One showing the head of the deceased was admitted over appellant's objection. Page 753:

> Appellant vigorously argues that the admission of this photograph in evidence constitutes reversible error in that the photograph did not show conditions as they existed at the time of death or shortly thereafter and that the photograph did not throw any light on the cause of Carlson's death and tended to prejudice the jury against appellant. (Court cited *State* v. *Gaines,* 258 Pac. 508, and quoted from that case as follows: "We cannot say that it was not necessary in proof of any material fact in the case. The fact, if it be a fact that it was calculated to prejudice or influence the minds of the jury would not be a sufficient objection to its admission if it was otherwise competent.")
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> In 2 Wharton's *Criminal Evidence,* 11th Edition, page 1319, Section 773, the rule is laid down as follows: "* * * Photographs showing the wounds of a deceased person are admissible although they did not show or purport to show all

> of the wounds received which resulted from the commission of the homicide charged. Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on whether it would be useful to enable the witness better to describe and the jury better to understand the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible. In the case at bar, appellant was strenuously insisting that the blows which he struck were in self defense. The question of appellant's guilt or innocence largely turned upon the degree of force which he used in the fight which resulted in Carlson's death. In this connection, the testimony of competent surgeons who examined Carlson's body was of considerable importance. * * * The State had the right to show that Carlson received wounds other than that which caused his death. Necessarily, a broad discretion must be allowed to the trial court in ruling upon such questions.

In *State* v. *Henderson,* Supreme Court of Oregon, *supra,* at page 408, the Court states:

> Photography has achieved such a high degree of excellence that in some instances it surpasses the spoken word as a means of portraying facts. Normally, photographs, when verified by required preliminary proof, are admissible in evidence: *State* v. *Casey,* 108 Or. 386, 213 P. 771, 217 P. 632. In the present instance, the photographs, according to our belief, show more clearly than the testimony of Dr. Sneeden that the wound in the back is the place where the bullet entered and the one in the chest the place where the bullet left. The conclusion appears to be inescapable that the photographs were material and essential to the State.

> The photographs, showing, as they do, wounds upon a dead man's body, are not pleasant to view. Bloodstained clothing, no one likes to touch. Yet there is nothing about these five objects which is peculiarly abhorrent or gruesome. The trial of a murder case is something which everyone prefers to avoid. The jurors in a case such as this realize the solemnity and the disagreeable nature of the duty which they are called upon to perform. Photographs which have appeared in the daily press during the war period showing the victims of atrocious misdeeds have steeled virtually everyone to gruesome sights.

In *State* v. *Nelson*, 162 Or. 430, 92 P. 2d. 182, 191, this court said:

> 'Although a photograph might be prejudicial because of its so-called gruesome character, it is nevertheless admissible in evidence if material to some issue in the case. *State* v. *Weston*, 155 Or. 556, 64 P. 2d 536, 108 A. L. R. 1402; *State* v. *Weitzel*, 157 Or. 334, 69 P. 2d 958, 2 Wigmore on Evidence, Sec. 1157; *Commonwealth* v. *Retkovitz*, 222 Mass. 245, 110 N. E. 293; *State* v. *Gaines*, 144 Wash. 446, 258 P. 508. A photograph of a dead body is properly admitted when it is material for the sole purpose of explaining and demonstrating the testimony of expert medical witnesses. *State* v. *Weston*, *supra*; *State* v. *Clark*, 99 Or. 629; 196 P. 360; *Commonwealth* v. *Winter*, 289 Pa. 284; 137 A. 261; *Carnine* v. *Tibbetts*, 158 Or. 21, 74 P. 2d 974. The photograph described in State's Exhibit O is not gruesome or prejudicial. *State* v. *Weston*, *supra*; *State* v. *Clark*, *supra*. *State* v. *Miller*, 43 Or. 325, 74 P. 658, cited by defendant, has been distinguished and is not in harmony with *State* v. *Weston*, *supra*. See, also, *State* v. *Finch*, 54 Or. 482, 103 P. 505, and *State* v. *Clark*, *supra*, where the case of *State* v. *Miller*, *supra*, is disinguished.'

Evidence may always be introduced to show the nature, character and extent of the injuries sustained as

indicative of the intent with which they were inflicted. 6 C. J. S. Section 116, page 980. *People* v. *Manning,* 320 Ill. App. 143, 50 N. E. 2d 118. *State* v. *Compton,* 31 S. D. 430, 205 N. W. 31.

In the Manning case the Court stated as follows:

> The injuries following the blow, while not strictly a part of the offense, shed light upon the result of assault with a truck crank handle and afford a fair estimate of the deadliness of the instrument as well as the quality of the intention. These reasons justify the rule, and the defendant here, judging from the record, was not prejudiced. Since the testimony is admissible, we see no objection to the doctor testifying in addition to Caputo to the injuries received. The doctor was better qualified to do so.

If a photograph can throw light on the subject of inquiry more clearly than oral testimony could, it may be properly admitted, and it is largely a question of discretion with the trial court. *Madden* v. *United States,* C. C. A., California, 20 Fed. 2d 289. *Vili Birghi* v. *State,* 43 Pac. 2d 210. *People* v. *Shaver,* 61 Pac. 2d 1170. *State* v. *Walsh,* 232 Pac. 194. *State* v. *Williams,* 257 Pac. 619, 23 C. J. S. Sec. 852, page 51, 52.

Plaintiff's Exhibits I and II in this instance, which were photographs of the body of the deceased, shortly after the crime was committed, indicate the nature and extent of the assault which brought about her death. The jury, as the triers of fact, had a right to determine the extent of the beating in connection with the question of purpose and malice which will be discussed more fully hereafter. The mute evidence of the brutality of the assault committed by appellant, as indicated in the photographs, while not a pleasant sight to behold, nevertheless under the foregoing decisions, were not inadmissible on that ground. Certainly, the photographs could not inflame the jury more than the brutal acts of appellant himself.

III

The Trial Court Did Not Err in Refusing to Instruct the Jury to Find the Appellant Not Guilty of Murder in the Second Degree on the Grounds that the Offense Charged Did Not Have Sufficient Evidence to Submit It to the Jury in Justifying a Verdict of Murder in the Second Degree

There is no question but what malice is a necessary ingredient in the crime of second degree murder under Section 4759, Compiled Laws of Alaska, 1933. But as has been stated both by text writers and in opinions from practically every jurisdiction, malice and intent may be inferred from circumstances and such inference is to be drawn if at all by the jury, who are the triers of the fact, under proper instructions from the Court. The Supreme Court has also expressed its opinion upon this question. In *Hopt* v. *People,* 104 U. S. 631, it is stated by Mr. Justice Gray in the Court's opinion:

> The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime. * * *
>
> * * * But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.

In *Tucker* v. *United States*, 151 U. S. 164, page 166:

> In statement of the case the following instruction was given by the Court. "You are not to excuse him to the extent of mitigating his crime because he was drunk unless he was in that condition where he was incapable of forming an intent, where he was incapable of coming to a conclusion, and it does not mean alone incapable of forming a specific intent to kill but it means incapable of forming a specific intent to do an act that may kill, that goes so far as to reduce the grade of the crime. If he could not form a specific intent to do the act he did do, then that would reduce the grade of the crime because of drunkenness. The defendant requested the Court to instruct the jury that if they believed from the evidence 'that the defendant was at the time of the killing of Lula May, drunk and that before becoming drunk he entertained no malice towards her and had no intention to take her life and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder.' "

The Court upheld the lower court's refusal to give the instructions requested by the defendant.

In *Sparf & Hanson* v. *United States*, 156 U. S. 51, we find the following language employed by Mr. Justice Harlan, at page 59:

> Quoting from instruction given by the lower court: "Malice, then, is an element in the offense and discriminates it from the other crime of felonious homicide which I have mentioned, to wit, manslaughter. That is, malice, express or implied, discriminates murder from the offense of manslaughter. Express malice exists when one, by deliberate premeditation and design formed with view to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats and concerted schemes

> against the victim. Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another. The two kinds of malice, therefore, to repeat, indicate but one state of mind established in different ways, the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed. That is, malice is inferred when one kills another without provocation or when the provocation is not great. Manslaughter is the unlawful killing of a human being without malice, either express or implied."

The Supreme Court in this case upheld the instructions just given. The above cited case also goes into a lengthy discussion involving the principle of the division between responsibilities of the Court to determine questions of law and of the jury to determine questions of fact.

Stevenson v. *United States*, 162 U. S. 313, at page 320, Mr. Justice Peckham:

> The proof of homicide as necessarily involving malice must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of the killing is to infer it from the surrounding facts, and that inference is one of fact for the jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter.

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> A judge may be entirely satisfied from the whole evidence in the case that the person doing the

> killing was actuated by malice, that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice, and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was and to say whether the crime was murder or manslaughter.

It is contended by appellant that if a dangerous weapon had been used, the presumption would be that the defendant intended the natural consequences of his act, and he admits that it is possible for that kind of malice to exist without the use of a dangerous weapon and suggests that even blows with the human fists or feet would indicate malice if long enough continued. (Ap. Op.Br. 21) That statement is supported by cases similar to the case before us. In *State* v. *Rees*, 107 Pac. 893, Supreme Court of Montana, it is stated:

> The charging part of the information in this case is summarized by the defendant's counsel in their brief that he beat and bruised, assaulted Sarah Rees, violently threw her to the ground, pulled her around by the hair of her head and otherwise committed grievous assaults upon her person until she became unconscious, that he then permitted her to lie on the ground exposed to the frost and inclemency of the weather, and neglected and refused to provide her with necessary clothing, shelter and protection, by reason of which assault and exposure Sarah Rees died.

Page 894.

> It is contended that the testimony is insufficient to justify the verdict. It would serve no useful purpose to quote it all or any considerable portion of it. It tended to show that both the defendant and deceased were addicted to the use of intoxicants frequently to excess. Both had been drink-

ing before their arrival. They continued to drink and carouse until the morning of December 6, when the defendant appeared at the house of one of his neighbors with the information that his wife was dead. * * * We think the testimony, while at times more strongly to prove the crime of manslaughter than that of murder, was still sufficient to warrant the jury in finding the defendant guilty of murder in the second degree which they did. If they disbelieved the testimony of the defendant, they may have been of the opinion that the circumstances attending the killing showed an abandoned and malignant heart.

People v. *Murphy*, 32 Pac. 2d 635, Supreme Court of California. Opinion of Chief Justice Waste: page 636:

The evidence is conclusive that the defendant died as a result of injuries inflicted upon her by the defendant while administering to her a severe and apparently unprovoked beating. * * * At the conclusion of the prosecution's case, the defendant took the stand in his own defense. He testified that during the day on which the homicide was committed, he had purchased and consumed approximately three bottles of bitters possessing an alcoholic content in excess of 50 percent by volume, that he remembered being in the apartment with his wife, the decedent, during the early part of the fatal evening; that the next thing he remembered was that he found himself wandering aimlessly along an ocean pier; that he concluded he must have hurt the decedent; that he returned home and found his wife suffering from the effects of the beating imposed; that he begged her forgiveness and undertook to make her comfortable during the remainder of the night; that as he left the next morning the owner of the apartment told him the police were seeking him; that subsequently upon learning of his wife's death he left the city and state. As already indicated, he suc-

cessfully avoided apprehension for several years. Defendant called no other witnesses.

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> Of course whenever the existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the trier of the facts in determining whether such purpose, motive or intent actuated the accused in the perpetration of the offense, may properly take into consideration the fact that he was intoxicated at the time. (Authorities, supra). However, the weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intent to kill and murder, which intent is a necessary element in murder of the first degree, are matters essentially for the determination of the trier of the facts. (Cases cited). From an examination of the entire record we cannot see that defendant, by reason of the use of intoxicants, was so disordered mentally at the time of the attack on the decedent as to preclude the resultant killing from being of that wilful, deliberate and premeditated character designated in Section 189 of the Penal Code as murder in the first degree. It is significant that defendant, when on the stand, testified in detail as to what transpired immediately before and immediately subsequent to the wrongful assault on the decedent. As to these events his recollection was reasonably vivid. His memory was faulty only as to the period during which the fatal injuries were being inflicted. In view of this, the trial court might very properly discount or reject defendant's testimony as to the extent of his intoxication and conclude that defendant was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts.

People v. *Odom*, 164 Pac. 2d 68, District Court of Appeals, Calif. In this case the defendant was convicted

of murder in the second degree, which conviction was affirmed. This case was based on circumstantial evidence brought out by witnesses who had heard arguing and fighting next door and heard a woman scream and holler, and the following morning noticed spot of blood on the sidewalk near defendant's residence, and upon entering saw deceased lying on bed with hands lying across one another, dead. Scar under left eye and dry blood around nose. Red seam appearing to be blood on the south wall, and bruises on both eyes and on the forehead just above left eye. At page 69 the Court states:

> From the foregoing testimony pursuant to the rule of law set forth above, the jury was justified in finding that death came to the deceased as a result of a beating administered by defendant. It would serve no useful purpose to discuss the testimony of the defendant in which he denied having struck the deceased.

People v. *Collins,* 5 N. W. Rep. 2d 556, Supreme Court of Michigan. In the foregoing case the defendant was convicted of murder in the second degree based on a death by beating after considerable drinking. The Justice Boyles, in affirming the conviction, rendered the following opinion. Page 562:

> Defendant claims the Court erred in failing to take from the consideration of the jury the charges of murder in the first degree and murder in the second degree as requested, and in refusing to submit the case to the jury solely as a charge of manslaughter. The record before us, including defendant's own testimony and admissions, justified the Court in submitting to the jury the question whether the killing was wilful, deliberate, premeditated or malicious. In *Weller* v. *People,* 30 Mich 16, the defendant was convicted of murder by kicking the deceased along the floor after she had fallen or been knocked down. There was no

proof tending to show the use of a weapon. The issue was whether death resulted from a blow of the defendant's fists, the kick, or by accident. The Court said, "In determining whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended, must usually be of controlling importance.

"It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. * * *

"The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent wilfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely."

It was the province of the jury, and not of the court, to decide whether there was much or little testimony which would reduce the crime from murder to manslaughter. While there may be little testimony to reduce the crime to manslaughter, it was for the jury to measure the quantity of proof.

I also instruct you, members of the jury, in the case of an offense such as the one charged, committed during a period of intoxication, the law presumes the defendant to have intended the obscuration and perversion of his faculties, which followed his voluntary intoxication. He must be held to have purposely blinded his moral perception and set his will free from the control or reason, to have suppressed the guards and invited the mutiny, and should therefore be held responsible as well for the

vicious excesses of the will thus set free as for the acts done by its prompting. In other words, it is well settled law in this State that voluntary drunkenness is not a defense to crime. A man who puts himself in a position to have no control over his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited and, when real, is so often resorted to as a means of nerving a person up to the commission of some deliberate act, and, withal, is so inexcusable in itself, that the law has never recognized it as an excuse for crime. * * * still, in a case of this kind if there is evidence introduced that the defendant was intoxicated at the time it is alleged he committed the crime, it should be considered by you for the purpose of determining whether the accused at the time of the alleged killing was capable of forming a wilful, deliberate and premeditative purpose to take life. And, as in this case, although you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injuries he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would be only at most murder in the second degree or manslaughter.

This has heretofore had the approval of this Court and was proper under the facts and circumstances of this case.

In *State* v. *Smith,* 83 Pac. 2d 749, Supreme Court of Washington, Justice Beals rendered the following opinion, at page 754:

In 13 R. C. L. Title Homicide, p. 745, appears the following: "The fists may not, indeed, be regarded generally as a deadly weapon, but they become most deadly by blows often repeated, long continued and

> applied to vital and delicate parts of the body of a defenseless, unresisting man on the ground."

The question that malice can be inferred from circumstances was also determined in the case of *Wuichet* v. *United States,* 8 Fed. 2d 561, C. C. A. 6th Circuit. In this case it was insisted by the defendant that there was no evidence of any purpose on defendant's part to defraud the purchaser of the stock or fraudulently to obtain money from them. He was convicted of using the mails to defraud, and in affirming such conviction Judge Moorman, at page 562 of the opinion, stated:

> It is enough to say that the evidence as a whole justified the finding of an underlying intent to defraud. That this element of an offense may be implied from established facts is beyond dispute.

There is certainly ample evidence in the present case from which the jury could infer malice and wilfulness on the part of the appellant, when considered in the light of testimony by Dr. Walkowski as to the badly beaten condition of the body and that the base of the skull was fractured and that it would take considerable force to cause the injury that he discovered (R. 39-41); the testimony of Lydia Savok, an eye witness to the assault (R. 138-149); testimony of eye witness Ted Bruckbauer, who also testified as to the brutal manner of the beating, at one point stating that the severity of the blows could be heard through a closed window (R. 162-170); plaintiff's Exhibits 1 and 2 being the photographs indicating the exten,t of the wounds and bruises; and the statement signed by Fuller and admitted as Exhibit 13 (R. 328-330).

Legal malice was defined in the case of *People* v. *Howard,* 295 Pac. 333, Supreme Court of California. Chief Justice Waste, in his opinion, at page 336, states as follows:

> The defendant contends that the evidence does not warrant a verdict of first-degree murder because of the asserted absence of a showing of express malice. Murder is defined as the unlawful killing of a human-being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. * * * When the killing is proved to have been committed by the defendant and nothing further is shown, the presumption of law is that it was malicious and an act of murder, but in such a case the verdict should be murder of the second degree and not murder of the first degree.

We also find in *State* v. *Henderson,* 184 Pac. 2d 392, Supreme Court of Oregon, an expression by the Court at page 412:

> Malice need not be proved by direct evidence It may be inferred from circumstances.

And at page 413:

> We do not believe that error was committed when the requested instruction was refused. In language to which the defendant takes no exception, the trial judge defined the various elements of homicide and added, "Whenever, as in this case, the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, you, the jury, may take into consideration the fact that defendant was intoxicated at the time, if you so find, in determining the purpose, motive or intent with which he committed the act. This assignment of error is without merit.

And in *United States* v. *Edmonds,* 63 Fed. Supp. 968, Dist. of Columbia, Justice Holtzoff in his opinion, at page 970, stated as follows:

> A killing under the influence of passion, induced by insufficient provocation, may be murder in the second degree, and an accidental or unintentional killing constitutes murder in the second degree if it is accompanied by malice. Legal malice does not necessarily mean a malicious or malevolent purpose or personal hatred or hostility toward the deceased. It is a state of mind which shows a heart unmindful of social duty and fatally bent on mischief, or which prompts a person to do an injurious act wilfully to the injury of another. *Liggins* v. *United States,* 297 Fed. 881.

Malice is further defined in the case of *United States* v. *King,* 34 Fed. Reporter, 302, Circuit Court, Eastern District N. Y., by Judge Lacombe at page 310:

> Malice, you will remember I told you, was the intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence toward the individual slain but also includes the case of a generally depraved, wicked and malicious spirit, a heart regardless of social duty and deliberately bent on mischief. It imports premeditation. Therefore, there must logically be a period of prior consideration, but as to the duration of that period no limit can be arbitrarily assigned.
>
> There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that, and if he meant so to testify, he would plead guilty. The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart,, the process of the mind, are to us or to any one outside of the individual exhibited by the acts which the individual performs, and we are entitled to infer what

his intent was, what were the processes of his mind and the feelings of his heart by a careful study of the acts which he performed and of the other external indications which he may have given of what his state of mind and heart was.

Malice is to be inferred from *all* the facts in the case. If malice is found it must be drawn as an inference from everything that is proved, taken together and considered as a whole. Every fact, no matter how small, every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of the deadly weapon, and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred.

Intoxication is no excuse for crime. A man cannot commit a crime and then say he was intoxicated and claim to go unwhipped of his offense. There is no excuse whatever for the commission of crime, but when shown it may do one of two things. It may sometimes bring murder down to the grade of manslaughter and it may sometimes bring apparent self-defense up to the grade of manslaughter. The court of appeals in this state has thus laid down the rule, "It has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk when the same offense, if committed by a sober man, would be murder, but if by reason of intoxication the defendant was so far deprived of his senses as to be incapable of entertaining a purpose or acting from design, then he might not be guilty of murder but be guilty of manslaughter." And the same rule is thus stated by a very eminent text writer, "Where the question of specific intent is essential to the commission of a crime (and I have already charged you that malice, which is intent, is necessary to the crime of murder) the fact that an offender was drunk when he did the act which being coupled with that intention would constitute the crime, should be taken into account by the jury in deciding whether he had that intention.

And in *Nestlerode* v. *United States,* 112 Fed. 2d 56, Court of Appeals, District of Columbia, by Chief Justice Groner, at page 59:

> The court instructed the jury that murder in the second degree is the unlawful killing of another where there is not a premeditated design and plan to effect death but where there is malice aforethought, and the court defined malice aforethought to comprehend an act done regardless of social duty and a mind bent upon mischief—an act of a generally depraved, wicked and malicious spirit—an act done with a depraved mind and attended with circumstances which indicate a wilful disregard of the rights or the safety of others. We can find no proper ground of criticism of the language in which the instruction is couched nor with the fact that the court submitted the case to the jury on that charge. * * * If there are mitigating circumstances, we have failed to find them. What happened is what might have been expected as a result of the events which appellant set in operation and is the natural and probable consequence of these acts. Malice is presumed under such conditions. (Citing *Liggins* v. *United States,* 297 Fed. 881. *Sabins* v. *United States,* 40 App. D. C. 440, 443.)
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> In the recent case of *Bishop* v. *United States,* 107 Fed. 2d 297, 301, we stated the circumstances under which voluntary intoxication will reduce the degree of the offense from murder in the first to murder in the second degree, but we said that defendant's voluntary intoxication would not, of itself, negative the malice required to constitute second degree murder and thereby reduce second degree murder to voluntary manslaughter. This is the correct and generally accepted rule. (Citing *State* v. *Trapp,* 109 Pac. 1094, among other cases)
>
> The result of appellant's acts was to bring to their deaths a woman and a man. It would be a sad reflection on justice and a menace to society to hold that because he had chosen to get stupidly drunk, he should escape the punishment of the law.

As will be noted from the foregoing opinions, intoxication is no defense to a crime and is to be considered by the jury as to what effect intoxication, if any, had upon the question of intent or malice. In *People* v. *Lami,* 36 Pac. Reporter 2d 192, Supreme Court of California, Chief Justice Waste stated, at page 193:

> The weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder in the first degree, are matters essentially for the determination of the trier of the facts. *People* v. *Murphy,* 32 Pac. 2d 635.

And in *State* v. *Weaver,* 58 Pac. 109, Supreme Court of Oregon, Judge Bean in his opinion, at page 110, states:

> The fact of being drunk or mental excitement or ungovernable rage which may be engendered by drinking intoxicating liquors will not reduce the crime of voluntary killing below the grade of murder. It is only when the actual existence of some particular motive, purpose or intent is a necessary element in the crime charged that the intoxication of the defendant becomes important, and not when the essential ingredients of the crime are implied by law from the manner of its commission. It was therefore perfectly proper to instruct the jury in the case at bar that upon the question as to whether the killing was done with deliberation or premeditation, the intoxication of the defendant could be considered in connection with all the other facts in the case. Nor was it error to refuse to instruct them that it might be sufficient to reduce the crime to manslaughter.

State v. *Trapp,* 109 Pac. 1094, Supreme Court of Oregon, at page 1096, Judge Eakin in his opinion states:

> So that the fact alone that one is intoxicated is not a defense for crime except that it may be taken into consideration in determining the purpose,

> motive or intent with which the act was done. Otherwise, it is unavailing unless it results in delirium tremens or other form of insanity.

Other cases dealing with the question of intoxication in connection with the crime of murder are *State* v. *Wallace,* 131 Pac. 2d 222, Supreme Court of Oregon; *Smith* v. *United States,* 269 Fed. 860, Dist. of Columbia; *Bishop* v. *United States,* 107 Fed. 2d 297, Dist. of Columbia.

Not only was the Court justified in refusing to instruct the jury to find the defendant not guilty of murder in the second degree, but under the circumstances and the authorities above cited, it would have been highly improper for the Court to give such an instruction, for it would have been removing from the consideration of the jury, as triers of the facts, a function which was within their province. The jury had a right to consider from all of the evidence whether or not the appellant was so intoxicated as to make him incapable of forming any intent or to entertain the malice necessary to the offense charged. The fact that they did not consider that the appellant was intoxicated to that extent was reflected in their verdict. And in reviewing the case in the light most favorable to the government, it becomes immediately apparent that the verdict was justified. That the instructions covering the various phases of the elements of the crime and the intoxication of the appellant were fair and thorough is strengthened by the fact that no exceptions were taken by the appellant, nor did he submit any requested instructions, although it is indicated in the Designation of Record by attorneys for appellant (R. 321).

CONCLUSION

The appellant had a fair and impartial trial and was ably represented by two attorneys. The trial court at every point in the proceedings was mindful of the appellant's rights. No legitimate reason exists for upsetting the verdict of the jury, and it is respectfully submitted that the judgment of conviction should be affirmed.

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